# The Meaning of 'Sexual' in the Sexual Offences Bill 2003

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The term 'sexual' occurs throughout the Sexual Offences Bill, presently before Parliament.[1] It is defined in clause 79, which was amended in Standing Committee. In what follows I first make some general comments, then go on to discuss the original wording of clause 79. Finally I analyse clause 79 as it now stands after amendment. It remains unsatisfactory.

## General

A typical use of 'sexual' in the Bill is in clause 10(1), which is applied by clause 14 and runs as follows-

> 10. (1) A person aged 18 or over (A) commits an offence if—
> (a) he intentionally touches another person (B),
> (b) the touching is sexual, and
> (c) either—
> (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
> (ii) B is under 13.

What is intended to be meant by 'sexual' here? Or to put it more accurately, what is its intended legal meaning?[2] As always, one starts with the dictionary. The Oxford English Dictionary (the OED) gives numerous meanings of the adjective 'sexual'. There are six main meanings, some of which have subdivisions. The list, omitting the numerous examples given, is as follows.

> 1. Of or pertaining to sex or the attribute of being either male or female; existing or predicated with regard to sex.
> (b) *spec.* in *sexual politics*, the principles determining the relationship of the sexes.
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> 2.
> a. Pertaining to sex as concerned in generation or in the processes connected with this.
> b. *sexual organs*, the organs of sexual generation in animals or plants.
> c. Of or pertaining to the organs of sex.
> d. *sexual system* (or *method*): the Linnæan classification of plants, based on the differences in their sexual organization.
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> 3. Relative to the physical intercourse between the sexes or the gratification of sexual appetites.
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> 4.

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[1] Francis Bennion's 145-page Briefing on the Bill will be found on his website www.francisbennion.com.

[2] It is the legal meaning of a term which is important in statutory interpretation: see F. A. R. Bennion, *Statutory Interpretation* (4th edn, 2002), s. 2.

a. Of animals and plants: Having sex; sexed; separated into two sexes; having sexual organs; producing offspring by means of sexual congress. (Opposed to *asexual*.)
b. *sexual cell*, a reproductive cell which is either male or female; a sperm-cell or an egg-cell.
c. Of reproduction in animals or plants: Taking place by means of the congress of the two sexes. Opposed to *asexual* or *agamic*.

5. Characteristic of or peculiar to the one sex or the other.

6. Having reference to the sexes.[3]

Suppose A is a surgeon circumcising a boy of 15, B. When A necessarily touches B's penis is that touching 'sexual' within the meaning of clause 10(1)(b)? If one goes by OED meaning 2c it certainly is. Even if one goes by OED meaning 3 it might be argued that it is. But obviously clause 10 is not intended to catch a surgeon carrying out his normal professional duties. Does clause 79 help?

## The Original clause 79

The original clause 79 ran as follows-

> For the purposes of this Part, penetration, touching, or any other activity is sexual if-
> (a) from its nature, a reasonable person would consider that it may (at least) be sexual, and
> (b) a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations.

I will here reproduce a passage from my book on the Bill *Sexual Ethics and Criminal Law*[4]-

> 'A common formulation in the Bill is that a person commits an offence 'if he (a) engages in an activity, and (b) the activity is sexual'. One wonders why the simpler form 'if he engages in a sexual activity' was not used – or even 'if he commits a sex act'. This vital word 'sexual' is the subject of an elaborate definition. This definition is so important that I must set it out here. [Here the definition given above is set out.]
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> This is legislative drafting at its most desperate (though one has every sympathy with the driven drafter). What can be the meaning of 'it may (at least) be sexual'? Does this complex definition mean anything more than 'an activity is sexual if a reasonable person would consider it sexual?' If

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> not, it gets us no farther. Here it is worth noting that the Oxford English Dictionary (2nd edn) has no fewer than six quite different definitions of the adjective 'sexual'. The Bill's elaborate definition gets us no nearer grasping which of the six is intended here. We are forced to turn for guidance to the official explanatory notes. They tell us-
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> > Clause 80 [now 79] defines 'sexual' for the purposes of this Part. This definition is relevant to many of the offences under this Part. For example, clause 3(1)(b) refers to penetration which is sexual and clause 9(1)(b) refers to touching which is sexual. Paragraph (a) requires the reasonable person to look at the nature of the activity in question. If, from looking at the nature of the activity, it would not

[3] *Oxford English Dictionary* (2nd edn, 1989).
[4] Lester Publishing, Oxford, 2003. The text of this short book is on Francis Bennion's website www.francisbennion.com.

> occur to the reasonable person that it would be sexual, it does not meet the test, even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity. The nature of some activities is such that they are obviously sexual, such as sexual intercourse, and they would meet the test. Other activities may or may not be sexual depending on the circumstances and the intentions of the people carrying them out, for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. These activities would meet the test in paragraph (a) since the reasonable person need only think that the activities may be sexual; he does not need to come to any conclusion about the matter. Activities which meet the test in paragraph (a) must then be considered under paragraph (b). In order to assess whether the activity is sexual, the reasonable person must look at any or all of the following factors: the nature of the activity; the circumstances in which the activity is carried out; and the purpose of any of the participants. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is sexual. But where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be sexual), the circumstances in which it is carried out (if it is in a doctor's surgery, it is probably not sexual) and the purpose of any of the participants (if the doctor's purpose is medical, the activity will not be sexual; if the doctor's purpose is sexual, it will be sexual).

> This weighty note overlooks the point made above that there are many meanings of 'sexual'. Under some of them a doctor's digital penetration of the vagina for purely medical reasons would certainly be termed sexual, since it relates to the sexual organs of the patient. We see that the Bill's definition of 'sexual' is useless unless you also have the explanatory note. That should not be the case, because most users of the intended Act will not have that note. Anyway the preface to the explanatory notes is at pains to point out that they have no authority, and should not be relied on.
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> We have here yet another example of the sex-negative nature of these proposals. What the Bill means by 'sexual' is having to do with sexual desire and what in some places it calls sexual gratification. Yet it is afraid to say so.'

As we have seen, the original clause 79 definition had two limbs (paragraphs (a) and (b)), both of which must be satisfied if the activity in question was to be held to be 'sexual'. Paragraph (a) said that from the nature of the activity a reasonable person would consider that it may (at least)[5] be sexual, while paragraph (b) adds that 'a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations'. I will examine these two tests in turn, drawing on the official note on clause 79 given above.

## Paragraph (a) of the Original clause 79

The official note says-

> Paragraph (a) requires the reasonable person to look at the nature of the activity in question. If, from looking at the nature of the activity, it would not occur to the reasonable person that it would be sexual, it does not meet the test, even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity.

[5] This little parenthesis was not the least mystifying thing in the original clause 79. I have no idea why it was there, and the official note did not help.

This confirms that the so-called definition of 'sexual' is not a true definition. It breaks the first logical rule of definitions by using the very term it is defining, and doing so on the footing that the reader *already knows* the intended meaning of that term. As Mellone wrote-

> 'A definition must not use the term to be defined. An apparent definition which commits this fault is said to be "circular" or "tautological" . . .'[6]

A further fault is that the supposed definition in clause 79 is obscure. Mellone said-

> 'The definition should not be obscure. This arises usually from the use of expressions which are less familiar than the one to be defined, thus defining "the obscure by the more obscure" (*obscurum per obscurius*).[7]

A clue is given by the reference to sexual gratification in the passage quoted above. Evidently it is assumed that the use of 'sexual' in the Bill is related to sexual gratification. Why not say so? After all there are references to sexual gratification elsewhere in the Bill. We see that something like OED meaning 3 is intended. I repeat, why not say so?

The passage quoted above suggests that the Government does not want 'obscure sexual fetishes' to be caught by the Bill. One wonders why. If a shoe fetishist distresses a woman by an activity which gives him sexual gratification, possibly to the point of ejaculation, why should he not be liable to punishment in the same way as other sexual
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offenders? This reference also indicates another failure of logic. It assumes that a 'reasonable person' will be unaware of the existence of fetishists, and will thus be an ignorant 'reasonable person'. Why should this unwarranted assumption be made?[8]

The official note on paragraph (a) continues-

> 'The nature of some activities is such that they are obviously sexual, such as sexual intercourse, and they would meet the test. Other activities may or may not be sexual depending on the circumstances and the intentions of the people carrying them out, for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. These activities would meet the test in paragraph (a) since the reasonable person need only think that the activities <u>may</u> be sexual; he does not need to come to any conclusion about the matter.'

This confirms what is said above that the Government's presumed (but shyly unstated) intention is to confine the meaning of 'sexual' to matters related to sexual gratification. It discloses yet another defect in this so-called definition. By saying that other activities may or may not be sexual depending on circumstances and intentions it shows that an unnaturally narrow meaning is given to the term 'activity'. When a surgeon carrying out circumcision on a boy of 15 touches the lad's penis the surgeon's 'activity' might I suppose be called just that, touching his penis. However a more usual and sensible description of the surgeon's 'activity' would be that he is a surgeon carrying out a routine circumcision operation. His activity is plainly not sexual within the libidinous meaning we now see is being given to that adjective. Paragraph (a) is not satisfied, and there is no need to go on to paragraph (b).

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[6] S. H. Mellone, *Elements of Modern Logic*, p. 45.
[7] Ibid., p. 44.
[8] For a discussion of whether a statute user is to be deemed educated or uneducated see Bennion, n. 2 above, pp 1015-1016.

*Paragraph (b) of the original clause 79* Paragraph (b) of the original clause 79 says 'a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations'. As I have indicated, this is unnecessary because in truth an 'activity' comprises its nature, its circumstances and the purpose of any person in relation to it. What is needed instead of the present clause 79 is a definition of 'sexual' which states expressly, without the need for surmise, speculation or guesswork, that the intended meaning is akin to OED meaning 3. I suggest the following-

> For the purposes of this Part, penetration, touching, or any other activity by a person is sexual if carried out with a view to the gratification of that person's sexual appetites.

Admittedly this would include activity by a sexual fetishist, which apparently the Government do not wish to cover. For reasons given above, it may be advisable for that to be reconsidered.

## The amended clause 79

Cause 79 as amended by Standing Committee B on 18 September 2003[9] reads-

> For the purposes of this Part, penetration, touching or any other activity is sexual if a reasonable person would consider that-
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> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
>
> (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

In moving the amendment Paul Goggins MP for the Government said[10]-

> '. Honourable Members may be aware that the way in which the definition of 'sexual' in clause 79 is currently framed caused concern in [the House of Lords]. It has already been a matter of some debate in this Committee. One of the noble Lords suggested that the clause's wording would be difficult for juries to understand, which could potentially involve their reaching the wrong decision on whether a particular act was sexual. There was also some confusion over the phrase '(at least)' in clause 79(1)(a). We do not want to interfere with the practical effect of clause 79 because we believe that it requires the jury to apply the right tests when deciding whether an activity was sexual. However, we have no wish to complicate matters for the jury and are happy to reword clause 79 in the interests of clarity.
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> 2. Clause 79 provides a definition of 'sexual' for the purpose of the offences in part 1 and is intended broadly to reflect the definition of 'indecent' in the context of indecent assault in current case law. The jury are required to use three criteria in their assessment of whether an activity was sexual: whether an act is sexual by its own nature or is only ambiguously sexual by nature; the circumstances in which the act took place; and the purpose of any person in relation to the act. In short, the test covers all activity that a reasonable person would consider to be sexual. However, it rules out any activity that a reasonable person would never consider sexual by reason of its nature, such as removing a person's shoes. That ensures that we do not capture activity that no reasonable person would consider to be sexual, and may have been sexual only because the defendant happened to have a secret fetish not made known to the victim - in that example, a foot fetish.

[9] Cols 311-313.
[10] For convenience of discussion I have added paragraph numbers.

3. At present the test in clause 79 works as follows. Its first part, in paragraph (a), covers any fundamentally sexual activity such as sexual intercourse or masturbation. In such cases, a reasonable person would be in no doubt, simply because of the nature of the act. Both the tests at paragraph (a) - that the nature of the act is sexual and that because of its nature a reasonable person would consider it sexual - would be met. As well as activity that is obviously sexual by nature, the clause also covers

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acts that may or may not be sexual depending on the circumstances and/or purposes of any person. For example, digital penetration of a woman's vagina by a doctor may be fundamental to diagnosis or treatment, but could also be wholly irrelevant and only carried out for the doctor's sexual gratification. The jury must therefore consider the circumstances and the doctor's purpose. Similarly, touching a person's thigh is by its nature possibly sexual, but the circumstances in which the touching takes place, and the reason for it, will determine whether it is in fact a sexual act.

4. As currently drafted, the whole of clause 79, including paragraphs (a) and (b), is relevant to all decisions on whether an act is sexual. Although the new version of clause 79 continues to apply the same tests, it clearly separates activity that is sexual by nature, and would be considered to be so by any reasonable person regardless of the circumstances in which it takes place or the purpose of any person in relation to it, from activity that is sexual only because of those circumstances or that purpose. That has exactly the same effect as the current test but will be easier for juries to understand. That should ensure that only activities that a reasonable person would consider to be sexual will fall within the scope of the offence in part 1.

## Comments on Amended clause 79

The amendment meets some of the criticisms given above, but most of them remain. The drafting is a little clearer, but that is all that can be said in its favour. The definition is still circular. It is still obscure, and not comprehensible without the Notes on Clauses and the Minister's explanation in Standing Committee. It still brings in an unnecessary 'reasonable person', who is still unreasonably assumed to be ignorant of sex fetishism. It is still mystifyingly assumed that a sex fetishist should not be punished like any other type of sex offender. It still misuses language by irritatingly assuming that say routine digital penetration of a woman's vagina by a doctor is not in any way 'sexual' when of course it obviously is. It still mystifyingly avoids saying what the dictionary says, namely that in the sense intended penetration, touching, or any other activity by a person is 'sexual' if carried out with a view to the gratification of that person's sexual appetites.

Paragraph 2 of the Minister's explanation is obviously defective regarding fetishism. In paragraph 3 the sentence 'Both the tests at paragraph (a) - that the nature of the act is sexual and that because of its nature a reasonable person would consider it sexual - would be met' is baffling in its obscurity. Paragraph 4 overlooks what is said above regarding the true nature of an 'activity'. And so on.

This perverse definition still has to be considered by the House of Commons at the report stage, and then still has to go back to the House of Lords. So there is still time for common sense to prevail. There is still time for criminal judges, magistrates, advocates and juries to be spared much future head-scratching. Do please let us have the obvious – it is so much easier in the long run.